

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Georgia Public Service Commission)	
Petition for Declaratory Ruling and)	WC Docket No. 06-90
Confirmation of Just and Reasonableness)	
Of Established Rates)	
)	

**REPLY COMMENTS OF CBeyond COMMUNICATIONS, CONVERSENT
COMMUNICATIONS, LLC, COVAD COMMUNICATIONS, DELTACOM, INC.,
MOMENTUM TELECOM, INC., NUVOX COMMUNICATIONS, INC., XO
COMMUNICATIONS, AND XSPEDIUS COMMUNICATIONS**

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June 5, 2006

SUMMARY

Commenters in this proceeding demonstrate that the Georgia Public Service Commission (“Georgia Commission”) has authority under the Act to adopt rates, terms, and conditions for section 271 network elements. The BOCs’ portrayal of section 271 as providing for exclusive federal jurisdiction is simply wrong. As comments in this proceeding have explained, in the Act, Congress explicitly linked section 271 network elements to the section 252 interconnection agreement approval process. Accordingly, section 271 network elements must be included in interconnection agreements, and those interconnection agreements must be filed with the applicable state commissions. State commissions, in turn, are responsible for approving or disapproving those interconnection agreements. The linking of section 271 network elements to a state commission’s authority to review and approve or disapprove interconnection agreements provides the Georgia Commission with the responsibility to ensure that the rates, terms, and conditions for network elements made available under section 271 meet the requirements of the Act. The BOCs have not pointed to anything, either in the Act or in the Commission’s orders, stating—or even suggesting—that Congress vested exclusive jurisdiction with the Commission to establish rates, terms, and conditions for section 271 network elements.

The Georgia Commission also is not preempted from adopting rates, terms, and conditions for section 271 network elements. Indeed, the only federal court that has addressed this issue to date (*Verizon v. Maine*) has concluded that state commissions are not preempted from adopting section 271 rates, terms, and conditions.’ Nor are there any public policy goals that necessitate preemption in this proceeding.

In the alternative, if the Commission determines that it has exclusive authority to establish rates, terms, and conditions for section 271 network elements (and it should not), then it

should endorse the rates, terms, and conditions that the Georgia Commission already has adopted.

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Cbeyond Communications, Conversent Communications, LLC, Covad Communications, DeltaCom, Inc., Momentum Telecom, Inc., NuVox Communications, Inc., XO Communications, and Xspedius Communications (collectively, "Joint Commenters"), through their undersigned counsel, respectfully submit their reply comments in the above-captioned proceeding. Commenters in this proceeding overwhelmingly demonstrate that the Georgia Public Service Commission ("Georgia Commission") has authority under the Communications Act of 1934, as amended (the "Act"), to adopt rates, terms, and conditions for section 271 network elements. The Commission must reject the Bell Operating Companies' ("BOCs") arguments that (1) the Commission has exclusive authority under section 271 of the Act, and (2) federal courts and state commissions already have concluded that state commissions, such as the Georgia Commission, do not have authority to determine whether the rates and terms for section 271 network elements meet the just and reasonable standard.¹ To the contrary, as comments in

¹ See, e.g., BellSouth Comments at 2 (claiming that "multiple federal courts, and over two dozen state commissions have concluded, state commissions have no authority to implement section 271.").

this proceeding demonstrate, the Act explicitly provides for joint federal and state authority with regard to the rates and terms for section 271 network elements.

To date, in contrast to the inapplicable cases that the BOCs cite, only one federal court has addressed the issue in dispute—whether a state commission may adopt rates, terms, and conditions for section 271 network elements—and it concluded that state commissions are not preempted under federal law from adopting rates, terms, and conditions for section 271 network elements.² Additionally, as the Joint Commenters demonstrate in their comments, numerous state commissions have found that they have authority to implement rates, terms, and conditions for section 271 network elements.³ The Georgia Commission’s authority to set rates for section 271 network elements extends to all section 271 network elements, including line sharing.⁴ Therefore, the Commission should grant the Georgia Commission’s Petition by confirming that the Georgia Commission has authority to set rates, terms, and conditions for section 271 network elements, thereby compelling BellSouth to abide by the rates that the Georgia Commission has established for high capacity loops and transport and line sharing. If the Commission determines that the Georgia Commission is preempted from establishing rates for section 271 network elements, then the Commission should grant the Georgia Commission’s alternative request by finding that the rates that the Georgia Commission adopted are just and reasonable and that BellSouth is bound to abide by those rates.

² See *Verizon v. Maine Public Utilities Comm’n*, 403 F.Supp.2d 96 (D.Maine 2005).

³ See Comments of the Joint Commenters at 6-9.

⁴ Conversent limits its comments to the authority of state commissions to set section 271 rates for unbundled loops and interoffice transport, including dark fiber interoffice transport.

I. THE GEORGIA COMMISSION HAS AUTHORITY UNDER THE ACT TO IMPLEMENT RATES, TERMS, AND CONDITIONS FOR SECTION 271 NETWORK ELEMENTS

Comments in the record demonstrate that the Georgia Commission unequivocally has authority to adopt rates, terms, and conditions for section 271 network elements.⁵ The BOCs' portrayal of section 271 as providing for exclusive federal jurisdiction is simply wrong.⁶ Although the Act does not explicitly address federal or state ratemaking authority for section 271 network elements, the language of the Act makes clear that state commissions have an integral role in evaluating the propriety of a BOC's section 271 network element rates and terms.

As the comments in this proceeding have explained, in the Act, Congress explicitly linked section 271 network elements to the section 252 interconnection agreement approval process.⁷ Accordingly, section 271 network elements must be included in interconnection agreements, and those interconnection agreements must be filed with the applicable state commissions.⁸ State commissions, in turn, are responsible for approving or disapproving those interconnection agreements. The linking of section 271 network elements to a state commission's authority to review and approve or disapprove interconnection agreements provides the Georgia Commission with the responsibility to ensure that the rates, terms, and conditions for network elements made available under section 271 meet the requirements of the

⁵ See Comments of the Joint Commenters at 2-6; Comments of ATX Licensing Inc. et al. at 6-15; Comments at Earthlink, Inc. at 2.

⁶ See BellSouth Comments at 17 (further arguing that section 271 is silent with regard to state authority, thus precluding the Georgia Commission from adopting rates, terms, and conditions for section 271 network elements).

⁷ See Comments of the Joint Commenters at 2-6. The Joint Commenters will not reiterate their arguments in full herein. See also Comments of ATX Licensing Inc. et al. at 6-11.

⁸ See Comments of the Joint Commenters at 2-6; Comments of ATX Licensing Inc. et al. at 6-15.

Act. By establishing this framework, Congress specifically contemplated that state commissions would have a role in implementing the section 271 network element checklist; accordingly, the Commission must reject the BOCs' arguments that section 271 reserved authority exclusively for the Commission.

There is no indication either in the Act or through the Commission's orders that Congress vested exclusive jurisdiction with the Commission to establish rates for section 271 network elements. Despite Verizon's and BellSouth's reliance thereon, the Commission's *InterLATA Boundary Order* does not support their argument that Congress vested exclusive jurisdiction in the Commission to establish section 271 rates.⁹ In the *InterLATA Boundary Order*, the Commission concluded that the Act provided exclusive jurisdiction to the Commission over LATA boundaries.¹⁰ In doing so, the Commission noted that, in the 1996 Act, Congress "explicitly granted authority to the Commission to approve the establishment or modification of LATA boundaries, both intrastate and interstate."¹¹ In contrast, in the present case, there is no similar statement in the Act expressly requiring the Commission—and the Commission alone—to oversee rates for section 271 network elements. The Act simply does not address ratemaking for section 271 network elements.

The Commission also must reject Verizon's claim that the court's decision in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*¹² indicates that the Georgia Commission does not have authority under the Act to administer rates for section 271

⁹ See BellSouth Comments at 17; Verizon Comments at 10 (citing *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding U S West Petitions to Consolidate LATAs in Minnesota and Arizona*, Memorandum Opinion and Order, 14 FCC Rcd 14392 (1999)) ("*InterLATA Boundary Order*").

¹⁰ See *id.* ¶ 16.

¹¹ See *id.*

¹² *Indiana Bell Telephone Company v. Indiana Utility Regulatory Comm'n*, 359 F.3d 493 (7th Cir. 2004).

network elements.¹³ In *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*, the court found that the IURC's performance measurement plan, upon which the IURC predicated its recommendation to the Commission regarding SBC's application for section 271 authority to enter the long distance market, interfered with the section 271 application process that Congress had established.¹⁴ The court explicitly limited its findings to the section 271 interLATA entry approval process and noted that the 1996 Act "specifically reserves some power to the states."¹⁵ Contrary to Verizon's argument, the court did not hold—or even suggest—that the states were prohibited from establishing rates for section 271 network elements.¹⁶

II. THE GEORGIA COMMISSION IS NOT PREEMPTED FROM ESTABLISHING RATES, TERMS, AND CONDITIONS FOR SECTION 271 NETWORK ELEMENTS

Having determined that the Georgia Commission has sufficient authority under federal law to address section 271 rates, the appropriate inquiry is whether there is any basis to preempt the particular action that the Georgia Commission took in setting those rates. The answer is no. As the comments in this proceeding demonstrate, the Georgia Commission should not be preempted from adopting rates, terms, and conditions for section 271 network elements. Contrary to AT&T's arguments, there are no public policy goals that necessitate preemption in this proceeding.

¹³ See Verizon Comments at 7.

¹⁴ *Indiana Bell Telephone Company v. Indiana Utility Regulatory Comm'n*, 359 F.3d at 497.

¹⁵ *Id.*

¹⁶ See Verizon Comments at 7 (arguing that "Congress conferred on state commissions only a 'limited role,' which they may not 'parlay' into authority to set substantive requirements or rates for 271 element.").

A. The Georgia Commission Should Not Be Preempted from Establishing Section 271 Rates

As comments in this proceeding demonstrate, the Georgia Commission should not be preempted from establishing rates for section 271 network elements in accordance with the just, reasonable, and nondiscriminatory standards set forth by the Commission.¹⁷ As explained above, federal law does not expressly preempt the Georgia Commission from setting rates for section 271 network elements.¹⁸ In *Verizon v. Maine Public Utilities Commission*, the court upheld the Maine Public Utilities Commission's adoption of section 271 rates finding that it is clear that the statute is not intended to have any preemptive effect on a state's ability to set rates for section 271 network elements.¹⁹ There is no indication that Congress intended for the Commission to occupy the field with regard to establishing rates, terms, and conditions for section 271 network elements.²⁰ Nothing in section 271 nor elsewhere in the Act provides the Commission with exclusive jurisdiction to establish rates, terms, and conditions for section 271 network elements. Nor does any provision in the Act explicitly prohibit the state commissions from establishing rates, terms, and conditions for those same network elements.²¹ If Congress had intended to foreclose state authority, then it would have specified so in an explicit manner.²² To the contrary, as discussed above, the Act explicitly provides state commissions with authority to establish rates, terms, and conditions for network elements.

¹⁷ See Comments of ATX Licensing Inc. et al. at 16; see also COMPTTEL Comments at 3-4.

¹⁸ See Comments of Joint Commenters at 8-9.

¹⁹ *Verizon v. Maine Public Utilities Comm'n*, 403 F.Supp. 2d at 102.

²⁰ See Comments of ATX Licensing Inc. et al. at 16-18.

²¹ See *id.* 16 (stating, "Congress never explicitly stated in § 271 that states lack the authority to establish rates and terms for 271 UNEs in accord with the established federal framework.").

²² See *id.* (quoting *Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 377 (1986) (Congress would have limited state authority in an "unambiguous and straightforward" manner)).

Commenters have not cited any authority indicating why the Georgia Commission should be preempted from setting section 271 rates. AT&T solely claims that the Commission should preempt the Georgia Commission's decision on the ground that the Georgia Commission acted outside of federal statutory and regulatory limits.²³ In the present case, however, the Georgia Commission adopted rates for section 271 network elements consistent with the standards that the Commission determined would be applicable to such network elements, *i.e.*, the just and reasonable and non-discrimination standards contained in sections 201 and 202 of the Act.

B. Preemption is Not in the Public Interest

Contrary to AT&T's argument, preemption is not necessary to preserve policy goals.²⁴ As the Comments of ATX Licensing et al. demonstrate, under long-standing principles, states are permitted to act as long as their actions do not conflict with the exercise of a legitimate federal policy.²⁵ In the present case, the rates set by the Georgia Commission for section 271 network elements do not conflict with any stated Commission public policy goal. Indeed, the rate-setting standard utilized by the Georgia Commission is the one adopted by the Commission. Furthermore, permitting the states to adopt section 271 rates is not inconsistent with the goals of the Act. To the contrary, permitting states to adopt section 271 rates is consistent with the federal/state approach that the Commission implemented—and the courts have blessed—with regard to rates for section 251 network elements. The state commissions are most familiar with the service offerings in their states and are in the best position to determine whether rates are just and reasonable and nondiscriminatory. The Georgia Commission's actions further the

²³ See AT&T Comments at 9-10.

²⁴ See *id.* at 12-13.

²⁵ See Comments of ATX Licensing et al. at 17 (citing *Geier v. American Honda Motor Company*, 529 U.S. 861 (2000)).

implementation of section 271 and hold BOCs to their obligations to make available certain network elements under that section.

III. THE COMMISSION SHOULD ENDORSE THE GEORGIA COMMISSION'S RATES, TERMS, AND CONDITIONS FOR SECTION 271 NETWORK ELEMENTS.

In the alternative, if the Commission determines that it has the exclusive authority to establish rates, terms, and conditions for section 271 network elements (and it should not), it should endorse the rates, terms, and conditions that the Georgia Commission already has established for section 271 network elements. As an initial matter, the Commission must reject BellSouth's argument that the Commission itself does not have the authority to evaluate the propriety of BellSouth's charges for section 271 network elements.²⁶ Contrary to BellSouth's argument, there is nothing in the Act that limits the Commission's review solely to the consideration of a BOC's long distance application or to the adjudication of complaints brought under section 271.²⁷ Indeed, BellSouth is forced to admit that the Commission has the authority to evaluate whether such a carrier's rates are just and reasonable and not unreasonably discriminatory under sections 201 and 202 of the Act.²⁸ Having authority to evaluate whether rates are just and reasonable under sections 201 and 202 of the Act means that the Commission can evaluate the propriety of the rates promulgated by the Georgia Commission under those same standards.

The Commission should endorse the section 271 rates that the Georgia Commission has established. In the *Triennial Review Order*, the Commission set forth the

²⁶ See BellSouth Comments at 2.

²⁷ See *id.*

²⁸ See *id.*

standard pursuant to which section 271 network elements would be evaluated.²⁹ Specifically, and as Verizon acknowledges, the Commission determined that section 271 network elements must comply with the just and reasonable and nondiscriminatory standards set forth in sections 201 and 202 of the Act.³⁰ This approach is similar to the approach that the Commission adopted with regard to section 251 network elements; that is, the Commission established a methodology (TELRIC) and the states adopted rates consistent with that methodology. In the present case, the Georgia Commission established rates, terms, and conditions for section 271 network elements consistent with the pricing standard that the Commission established for those particular network elements.

Moreover, the Commission itself has not expressed an intent to exercise exclusive jurisdiction over section 271 network elements.³¹ In the *Triennial Review Order*, the Commission stated that network elements made available under section 271 would be subject to the just and reasonable pricing standards of sections 201 and 202 of the Act.³² In other circumstances where the Commission has had the authority to act courts have upheld state action establishing requirements when the Commission has not yet acted.³³

²⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 656 (2003) (“*Triennial Review Order*”).

³⁰ Verizon Comments at 17.

³¹ *See, e.g., Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 718 (1985) (stating “because agencies normally address problems in a detailed manner and can speak through a variety of means, ... we can expect that they will make their intentions clear if they intend for their regulations to be exclusive.”).

³² *Triennial Review Order* ¶ 656.

³³ *See, e.g., Qwest Corporation v. Scott*, 380 F.3d 367 (8th Cir. 2004) (upholding state regulation requiring Qwest to comply with certain state reporting requirements pertaining to access lines and finding that “the FCC has not yet acted ..., either to establish federal performance measures and standards, or to declare that there shall be no such measures and standards at either the federal or state level.”).

Contrary to Verizon's argument, the Georgia Commission's methodology for adopting rates, terms, and conditions for section 271 network elements is appropriate. Verizon has not identified any flaw in the Georgia Commission's methodology, instead complaining that the Georgia Commission's rates are inappropriate because only the market can set the rates.³⁴ Sections 201 and 202 of the Act mandate that the rates be just, reasonable and non-discriminatory; those sections do not mandate that the rates be set by the market. Indeed, blind reliance on rates set by a market in which BellSouth is able to refuse to negotiate would be an abdication of regulatory responsibility. The Commission has required that section 271 network element rates must be just and reasonable and that such rates need not be calculated using the TELRIC pricing methodology; the Commission did not otherwise specify the particular methodology by which a particular section 271 rate is determined. As the Comments of ATX Licensing Inc. et al. demonstrate, state commissions are in the best position to determine section 271 rates, because state commissions are more knowledgeable about the competitive wholesale offerings and rates in their states than the Commission.³⁵ Therefore, the Commission should find and conclude that the Georgia Commission applied an appropriate methodology in arriving at section 271 rates and should endorse the same.

IV. THE GEORGIA COMMISSION APPROPRIATELY ADOPTED A RATE FOR LINE SHARING

The Commission must reject BellSouth's and Verizon's arguments that BOCs are not required to make available line sharing under section 271 of the Act.³⁶ Under the section 271 Competitive Checklist, BOCs are required to make available certain network elements, including

³⁴ *See id.*

³⁵ Comments of ATX Licensing Inc. et al. at 33-34.

³⁶ *See* Verizon Comments at 20-24; BellSouth Comments at 14-15.

“local loop transmission.”³⁷ The Commission repeatedly has confirmed that BOCs have an obligation under Checklist Item 4 (local loop transmission) to provide access to line sharing.³⁸ In the *Line Sharing Order*, the Commission defined the high frequency portion of the local loop as a UNE that must be provided to requesting carriers on a nondiscriminatory basis “pursuant to section 251(c)(3) of the Act and, thus, checklist items 2 and 4 of section 271.”³⁹

In an attempt to convince this Commission that line sharing is not required to be made available as a section 271 network element, Verizon argues that it was not until after 1999 that the Commission declared line sharing to be a UNE under section 251, and, “[o]nce the Commission declared line sharing to be [a] UNE and, therefore, a Checklist Item 2 requirement, nothing turned on the question whether it was also independently required under Checklist Item 4.”⁴⁰ This argument is simply incorrect. Subsequent to determining that line sharing is a UNE under section 251, the Commission continued to evaluate whether a BOC made available line

³⁷ 47 U.S.C. § 271(c)(2)(B)(iv).

³⁸ See, e.g., *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, 17 FCC Rcd 25828, ¶ 144 (2002); see also *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, 16 FCC Rcd 8988 (2001); *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, Memorandum Opinion and Order, 17 FCC Rcd 9018, 218 (2002) (finding that BellSouth satisfied checklist item 4 based on, among other things, “BellSouth’s processes for line sharing and line splitting.”).

³⁹ *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, 16 FCC Rcd 8988, ¶ 163 (2001) (citing *Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (“*Line Sharing Order*”).

⁴⁰ Verizon Comments at 22.

sharing under Checklist Item 4. Indeed, as one example, in evaluating BellSouth's application for section 271 authority in Tennessee and Florida, the Commission specifically examined whether the BOC was providing line sharing in a nondiscriminatory manner.⁴¹ In concluding that BellSouth's provision of line sharing was adequate, the Commission specifically stated that it found that "BellSouth's provisioning of line-shared loops satisfies *checklist item 4*."⁴² Since line sharing is part and parcel of checklist item 4, it is required to be made available under section 271.

The Commission also must reject Verizon's argument that line sharing is not required under section 271 because the Commission issued a transition plan for line sharing.⁴³ The Commission implemented transition plans for several of the section 251 network elements that it was delisting, including local switching and high capacity loops and transport (in particular central offices and on certain routes), in addition to line sharing.⁴⁴ Notwithstanding these transition plans, there is no question that the BOCs continue to be required to provide each of these delisted section 251 network elements under section 271 of the Act.

V. CONCLUSION

For the foregoing reasons, the Commission should grant the Georgia Commission's Petition and confirm that the Georgia Commission has exercised its lawful

⁴¹ See, e.g., *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, 17 FCC Rcd 25828, ¶ 144 (2002).

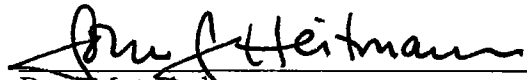
⁴² See, e.g., *id.* (emphasis added).

⁴³ Verizon Comments at 23.

⁴⁴ See, e.g., *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 198 (2005) (specifying a transition period for high-capacity loops that have been unbundled).

authority under the Act to set rates, terms, and conditions for section 271 network elements. In the alternative, the Commission should endorse the rates that the Georgia Commission has adopted for section 271 network elements.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John J. Heitmann", written over a horizontal line.

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June 5, 2006

CERTIFICATE OF SERVICE

I, Chris Rathlev, hereby certify that on this 5th day of June, 2006, I served a true and correct copy of the Reply Comments of Cbeyond Communications, Conversent Communications, LLC, Covad Communications, Deltacom, Inc., Momentum Telecom, Inc., NuVox Communications, Inc., XO Communications, and Xspedius Communications in Docket No. 06-90 on the following via U.S. mail, postage prepaid, unless otherwise indicated.

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